No. 92-486

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

v.

EDGE BROADCASTING COMPANY,
t/a POWER 94,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a ban on commercial speech that is wholly ineffective in promoting a governmental interest when applied to a particular speaker violates the First Amendment to the United States Constitution?

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STATEMENT OF THE CASE

This is an as-applied constitutional challenge brought by a traditional First Amendment speaker. The speaker, a radio station, sought to enjoin the application of 18 U.S.C. §§ 1304 and 1307 to its operations on the ground that the statutes infringed its First Amendment rights. The trial of this action produced a detailed, comprehensive, and uncontradicted factual record which proved empirically that, as-applied to respondent, the statutes in question are ineffective in promoting or discouraging lottery participation, in promoting federalism, or in accomplishing

any other governmental purpose. The sole effect of the statutes is to disadvantage one licensee *vis-a-vis* its competitors and prevent it from broadcasting information which inundates the area reached by its signal. Based on this record, both the United States District Court for the Eastern District of Virginia (Kaufman, J.) and the United States Court of Appeals for the Fourth Circuit ruled that application of 18 U.S.C. §§ 1304 and 1307 to respondent was unconstitutional.

This case does not involve the application of 18 U.S.C. §§ 1304 and 1307 generally. The holding is limited to the unique facts presented to the District Court, and the case is *sui generis*. The issue is not the validity of the bright line rule established by the statutes, but whether laws can infringe speech where they accomplish no governmental purpose.

FACTS

An "as-applied" constitutional challenge is judged on the facts and the facts of this case are nothing if not unusual. Edge Broadcasting Company ("Edge") owns WMYK-FM, a 100,000-watt radio station. The station is licensed by the FCC to Elizabeth City, North Carolina and broadcasts from Moyock, North Carolina, a town about three miles south of the North Carolina/Virginia border.[1] (JA 19). WMYK has a dual identification of Elizabeth City

[1] Record citations are made to the Joint Appendix filed with this Court.

and Virginia Beach, Virginia. Its studios and corporate offices are located in Virginia Beach. (JA 19).

Ninety-two and two-tenths percent (92.2%) of the people comprising WMYK's listening audience live in Virginia. Seven and eight-tenths percent (7.8%) live in North Carolina. WMYK's signal reaches nine North Carolina counties but fewer than two percent (2%) of all North Carolinians live in these counties. (JA 26-27). The Commonwealth of Virginia operates a lottery;[2] the State of North Carolina does not.

North Carolina residents who live within WMYK's broadcast area listen to broadcasts of Virginia-based radio stations, view Virginia-based television and read Virginia newspapers. (JA 25-26). Seventy-nine percent (79%) of all radio stations whose broadcast signals reach these counties are licensed in Virginia; approximately sixty-two percent (62%) of all radio listening in these counties[3] is directed to radio stations licensed to Virginia. (JA 26-27).

During a given week in which the Virginia lottery advertises an instant game, for example, the radio stations[4] advertising the lottery air, on the average, 12 lottery advertisements each day and reach, in any given quarter hour of radio, an audience of 4,400 North Carolinians over the age of 18. During a typical advertising

[2] *See Va. Code* § 58.1-4001 (1987), authorizing the Commonwealth to sponsor a lottery.

[3] The counties are Camden, Chowan, Currituck, Dare, Gates, Hertford, Northampton, Pasquotank and Perquimans. (JA 26).

[4] The stations are: WCMS-FM, WFOG-FM, WLTY-FM, WTAR-AM, WNOR-FM, WOWI-FM, and WNVZ-FM. (JA 26).

period for one instant game, these Virginia stations aired 452 60-second spots advertising the lottery. This type of advertising will run continuously so long as Virginia has a lottery. (JA 27, 41). In addition, vast numbers of Virginia advertisers include their affiliation with the lottery in their promotional messages.

The residents of this part of North Carolina are also exposed to Virginia lottery advertising on television, the dominant informational media. The four Hampton Roads area television stations which air Virginia lottery advertising enjoy large audiences in the nine-county WMYK service area and beyond.[5] Seventy-five percent of all television viewing in four of these counties is directed to Virginia stations; between 50% and 75% is directed to Virginia stations in three counties; and between 25% and 50% is directed to Virginia stations in two counties. (JA 28-30). With an average of 274 television ads airing during a typical advertising campaign for an instant game, and with lottery news stories broadcast as a matter of course, virtually every North Carolinian living in the part of North Carolina reached by WMYK's signal is exposed to the Virginia lottery. (JA 28).

The North Carolinians residing in WMYK's service area are also supplied with Virginia lottery advertising by the Virginia newspapers which serve the area. These papers carry Virginia lottery advertising and circulate approximately 10,400 newspapers daily, 11,250 on Saturday, and 12,500 on Sundays. (JA 32).

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[5] These stations are: WAVY, WVEC, WTKR, and WTVZ. (JA 26).

Advertising the Virginia lottery is big business, both for the Virginia Lottery Board and for the many private retailers affiliated with the lottery. Excluding the cost of production, for example, the Lottery Board spent $1,202,905.00 on its introductory advertising campaign. It spent a total of $4,354,199 to introduce its first three instant games. At the time of the trial, it anticipated spending about $2.3 million to introduce its on-line games and about $3 million a year to sustain them. (JA 40-41; 24-25).[6]

Both the Lottery Board and private businesses advertise the lottery extensively in Hampton Roads. The Virginia Lottery Board buys advertising from seven Hampton Roads radio stations, four television stations, and three newspapers. (JA 26, 28, 31). As of the time of trial, there were approximately 1,414 Hampton Roads businesses selling lottery tickets. Many of these outlets trumpet their status as lottery retailers in their advertising. (JA 42; 32).

Like other Americans, North Carolinians have great appetites for television and radio. Television viewers and radio listeners alternate between various stations. The same people who watch television also listen to the radio and read newspapers. (JA 36). In the average American

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[6] While the Virginia Lottery spends a great deal of money on advertising, the content of its advertisements is informational rather than promotional. Section 58.1-4022(E)(ii) of the Virginia Code prohibits the State from expending any funds "for the primary purpose of inducing persons to participate in the lottery." *Cf.* Va. Code § 58.1-4022(E)(i) (authorizing the expenditure of funds for informational purposes).

household, the television set is turned on for seven hours and eight minutes per day. (JA 30).[7]

Ninety-nine percent of all American households have radios. In these households, the inhabitants have an average of 5.6 radios per household. Sixty-one percent (61%) of all adults have radios at work and listen to the radio fifty-three percent (53%) of the time. Ninety-five percent (95%) of all automobiles have radios, and seventy-seven percent (77%) of all adults are reached every week by car radio. (JA 31). Ninety-six and one-tenth percent (96.1%) of all American men and ninety-five and seven-tenths percent (95.7%) of all American women over the age of 18 listen to the radio during any given week.[8]

The impact of sections 1304 and 1307 on WMYK was severe. WMYK did not broadcast any Virginia lottery information at all because it feared that it would be prosecuted or subjected to administrative penalties. (JA 55-56). It refrained from airing any lottery press releases and any stories containing data on the why, how, when and where of the Virginia lottery because it could not predict what was permissible and what was not. (JA 55-58).

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[7] Men watch television on the average of four hours and 14 minutes a day; women, an average of five hours and 12 minutes a day; teenagers, between the ages of 12 and 17, watch an average of three hours and eight minutes a day; and children, between the ages of 2 and 11, watch an average of 3 hours and 40 minutes a day. (JA 30).

[8] American men listen an average of 2.55 hours every day; American women listen an average of 2.53 hours a day. All Americans over the age of 12 listen to the radio for an average of three hours a day. (JA 31).

Of the 999 enterprises advertising on WMYK as of May 26, 1989, only 17 were located in North Carolina. Since only .017% of WMYK's advertisers live in North Carolina, its economic existence hinges on its ability to attract Virginia advertisers. Sections 1304 and 1307 prevented WMYK from carrying advertisements for Virginia businesses wishing to advertise their affiliation with the Virginia lottery. (JA 59). WMYK, therefore, lost advertisers who wanted to include a reference to their affiliation with the Virginia lottery. (JA 52-53). Radio ads are generally prepared and taped in advance, and many WMYK advertisers would not alter their advertising copy to delete lottery related messages. (JA 51-54). WMYK had to refuse to broadcast such ads.

The government's ban on WMYK did not reduce the number of lottery ads broadcast. Advertising budgets are fixed. The advertiser apportions the budget among various competitors. When WMYK was not able to accept advertisements, the advertising simply went to another broadcaster. WMYK's competitors were free to broadcast that which WMYK was prohibited from transmitting, and they did so. WMYK's enforced silence did not diminish either the volume or effectiveness of lottery advertisements.

SUMMARY OF ARGUMENT

The issue in this case is whether statutes prohibiting speech pass constitutional muster even though, as applied, they advance no governmental objective. The issue is not whether 18 U.S.C. §§ 1304 and 1307 are

invalid; these statutes have not been found to be facially invalid and are enforced throughout the United States. Whether those statutes can be applied to prevent one broadcaster from broadcasting information which is regularly transmitted by all its similarly situated competitors and which inundates the area reached by its signal is a different issue from facial invalidity.

In *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), the Court held that to be constitutional a statute prohibiting commercial speech must be effective in directly advancing a substantial governmental interest. In *Board of Trustees v. Fox*, 492 U.S. 469, 484-85 (1989), the Court held that an as-applied, empirically grounded challenge to a statute prohibiting commercial speech was not only appropriate, but the preferred method to test the constitutionality of such a statute. The District Court carefully followed the holdings of these cases, examined the uncontradicted evidence and reached the only conclusion supported by the record, *i.e.*, the statutes did not effectively advance any substantial governmental interest and were, therefore, unconstitutional as applied. *Edge Broadcasting Co. v. United States*, 732 F. Supp. 633 (E.D. Va. 1990). The United States Court of Appeals for the Fourth Circuit reviewed the same overwhelming factual record and affirmed. *Edge Broadcasting Co. v. United States*, reprinted in Pet. App. 1a - 9a. Both lower courts were correct.

A statute which silences one speaker out of many is unconstitutional if it directly advances no governmental interest whatsoever. What would have been surprising is a holding that even though the statutes were demonstrated empirically to be ineffective, they could still be

applied. What is even more surprising is the government's attempt to enforce the statutes where enforcement promotes no governmental interest.

There is a fundamental difference between the power to regulate and the ability to use that power ineffectively and arbitrarily. That the government has the power to regulate lottery advertising does not mean it can enact regulations which simultaneously infringe constitutional rights and fail to advance governmental objectives. If all broadcasting signals from every station reached the entire United States, no one would seriously suggest that Congress could legislatively prohibit broadcasters located in the 17 nonlottery states from broadcasting lottery advertisements. Even if Congress has the power to regulate gambling advertising, this does not mean that Congress has the power to prevent one similarly situated broadcaster from broadcasting that which all others are broadcasting. The requirement that legislation infringing on constitutional rights must be effective in advancing governmental goals in order to be constitutional is neither surprising nor revolutionary. This case is governed by *Central Hudson* and *Fox*, and the lower courts correctly applied those holdings to the facts proven at trial.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS RESPONDENT'S RIGHT TO SPEAK.

Petitioners initially ask this Court to deprive certain commercial speech of any constitutional protection. While their request arises in the context of speech about

gambling, it is not limited to this activity alone. The test petitioners urge would allow Congress to restrict commercial speech about any conduct Congress *could* prohibit. It would not matter that Congress declined to exercise its power of prohibition. The mere fact that it has the power to ban would be enough to deprive commercial speech about the disfavored topic of any constitutional protection.

Since Congress can prohibit virtually any conduct except as specifically proscribed by the Constitution, *United States v. Darby*, 312 U.S. 100, 114 (1941), the test that petitioners propose is breathtaking in scope. It would require not only the overruling of *Central Hudson*, but also repudiation of the fundamental constitutional tenant that society is best served by giving its citizens the information necessary to make informed choices.

A. Development of Commercial Speech Protection.

The First Amendment protection accorded commercial speech effectively began in 1975 with *Bigelow v. Virginia*, 421 U.S. 809 (1975). The Court overturned on First Amendment grounds the conviction of the editor of a newspaper for publishing in Virginia an advertisement for an abortion referral agency in New York. After reviewing its earlier decisions, the Court stated that they do " . . . not support any sweeping proposition that advertising is unprotected *per se*." *Id.* at 820.

In *Virginia State Board of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), a statute forbidding licensed pharmacists from engaging in price

advertising for prescription drugs was struck down on First Amendment grounds. Even though the Virginia statute was not irrational in assuming that price advertising might affect professionalism, the Court invalidated the statute and said: "[T]he choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Id.* at 770.

In *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), a municipal ordinance which, for the purpose of preventing white flight, forbade the posting of "For Sale" or "Sold" signs on residential property was unanimously struck down. Even though it was rational for a legislature to conclude that a profusion of "For Sale" signs would indicate and perhaps exacerbate white flight, the Court again invalidated the ordinance and repeated *Virginia State Board*'s admonition that, "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Id.* at 97. In *Carey v. Population Services International*, 431 U.S. 678 (1977), a statute prohibiting any "advertisement or display" of contraceptives was held invalid.

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980), synthesized prior commercial speech rulings. The "four-step analysis" necessary in a commercial speech case was articulated as follows:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected

> by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

Id. at 566.

While the scrutiny applied to commercial speech is not as searing as that applied to political speech, laws restricting commercial speech are subject to "searching scrutiny." *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 573 (1980) (Blackmun, J., concurring) (analysis of content of commercial communications is "intermediate level of scrutiny"). Consumers' interest in the free flow of commercial information may be as keen, if not keener, than their interest in the day's most urgent political debate. *Virginia State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976). As a result, the government carries the burden of justifying any restriction on commercial speech. *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n.20 (1983).

B. The Power to Regulate Commercial Speech Does Not Include the Power to Regulate Arbitrarily or Ineffectively.

Nothing in the decisions cited above suggests that this Court has adopted a sliding scale of constitutional protection. So long as *Central Hudson*'s threshold test was satisfied, speech about previously illegal conduct, *e.g.*, *Bigelow v. Virginia*, 421 U.S. 809 (1975), was afforded the same protection as speech about price and item advertising, *e.g.*, *Virginia State Board of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). As Justice White explained in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985):

> Commercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted *only* in the service of a substantial governmental interest, and *only* through means that directly advance that interest.

Id. at 638 (emphasis added).[9]

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[9] As petitioners concede (Pet. Brief at 18), the commercial speech cases decided since 1975 have changed the law since the days of *Ex parte Jackson*, 96 U.S. 727 (1877) and *In re Rapier*, 143 U.S. 110 (1892). The effect of these changes on 18 U.S.C. §§ 1304 and 1307 was noted by the former Chairman of the Federal Communications Commission in testimony about amendments to those statutes. Dennis R. Patrick stated that sections 1304 and 1307 "may be constitutionally infirm given the increased recognition of First Amendment protection accorded commercial speech since the lottery provision was originally enacted. . . ." *See* House Report accompanying HR 3416, 100th Cong. 2d Sess. (March 31, 1988) (letter of Dennis R. Patrick dated November 3, 1987).

Petitioners' proposal to deprive commercial speech about gambling of any constitutional protection is based primarily on Chief Justice Rehnquist's observation in *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986), that it would be:

> a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand.

Id. at 346. From this dicta, petitioners argue that the government can sustain any prohibition on gambling advertising without regard to whether the regulation is arbitrary or effective. Since the government has the power to ban gambling advertising, petitioners argue it must have the power to enact lesser regulation without regard to effectiveness, *i.e.*, the power to ban gambling advertising includes the right to be arbitrary or ineffective when enacting anything less than a total ban. There is not a shred of support in *Posadas*, even in dicta, for this revolutionary notion. The Court has never held that the government is free to arbitrarily or ineffectively infringe speech rights simply because of the subject matter of the speech. The power to regulate and how that power may be implemented consistent with the Constitution are very different issues.

In *Posadas*, the Court rejected a *facial* challenge to a Puerto Rican law prohibiting casino gambling advertising directed at Puerto Ricans but not tourists. Because the challenge was facial, there was no empirical data in the

record concerning the effectiveness of the statute. Considering Puerto Rico's island geography and isolated locale, the narrowing construction placed on the law by the Puerto Rico Superior Court, and the rational basis for the conclusion made by the legislature, the Court refused to hold that the ban on advertising could *never* further the government's interest. Significantly, the Court in *Posadas* did not abandon *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). It instead cited *Central Hudson* as the controlling authority. 478 U.S. at 340. If the petitioners in *Posadas* had proved empirically that the statute was completely ineffective, the statute would not have been sustained.

There is nothing in *Posadas* which even suggests the government is authorized to use the power to ban speech arbitrarily or ineffectively. While petitioners argue that *Posadas* stands for the proposition that the power to regulate includes the power to promulgate any regulation if it can be rationalized without regard to empirical effect, *Posadas* does not support this proposition. Historically, statutes have been tested on the basis of how they operate in the real world and not on the basis of how they can be conceptualized. In *Posadas* the Court did not substitute ratiocination for fact finding, and there is no basis for such a substitution.

Under the scenario suggested by petitioners, the government would have the authority to permit every casino except one from advertising on the ground that banning

advertising from one casino would reduce the total amount of advertising, which in turn might reduce demand for gambling. The ban would be constitutional even if it were proved that silencing the one casino accomplished nothing. This would be an absurd result.

No one would deny the government's appetite for absolute power, nor its ingenuity in rationalizing its need for the absolute power it craves. One can rationally justify much that is empirically nonsensical. Substituting ratiocination for empirical examination of actual evidence would exponentially expand the government's power and simultaneously decrease the rights of citizens. This Court has not yet taken that step, and this case does not justify the adoption of the radical new jurisprudence urged by petitioners.

II. THE ADVERTISING BAN DOES NOT DIRECTLY ADVANCE A LEGITIMATE GOVERNMENTAL INTEREST WHEN APPLIED TO RESPONDENT.

An "as-applied" challenge must necessarily be judged on the evidence introduced at trial. Although the government bears the burden of justifying a restriction on commercial speech, *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n.20 (1983), petitioners did not introduce any evidence proving or tending to prove that sections 1304 and 1307 directly advance a governmental interest when applied to respondent. The extensive evidence that respondent introduced demonstrating the ineffectiveness of these statutes was either stipulated or uncontroverted.

It is, of course, understandable why petitioners attempt to ignore the facts. The goal of an advertiser is to saturate a community with its message. Once the community is saturated, the advertiser has achieved its goal. How saturation is achieved is irrelevant. The advertiser cares that the message is disseminated and reaches the public and has no interest as to how or on what station the message is transmitted. If an area is already saturated with a message, it is irrelevant how saturation occurs, and preventing one speaker from carrying advertising accomplishes nothing.

Based on the record developed at trial, the United States Court of Appeals for the Fourth Circuit affirmed the district court's finding of unconstitutionality. The Fourth Circuit stated:

> Under the unique circumstances of this case, the government's goal to preserve state lottery policies is not advanced by precluding Power 94 from broadcasting Virginia lottery advertisements. Approximately 127,000 North Carolina residents are within Power 94's broadcast range. These listeners, who comprise less than 2% of North Carolina's total population, receive most of their radio, newspaper and television communications, from Virginia-based media. The North Carolina residents who might listen to Power 94 are inundated with Virginia's lottery advertisements. Simply put, the North Carolina residents which the statutes purport to protect already are exposed to numerous Virginia Lottery advertisements through telecast, broadcast and print media. Prohibiting Power 94 from advertising Virginia's lottery is ineffective in shielding North Carolina residents from lottery

> information. This ineffective or remote measure to support North Carolina's desire to discourage gambling cannot justify infringement upon commercial free speech.

(Pet. App. 6a - 7a).

Confronted with a record that overwhelmingly proves the statutes' ineffectiveness when applied to respondent, petitioners seek to change a fundamental tenant of constitutional jurisprudence. They decry empiricism – particularly when a statute is applied to an individual plaintiff. In petitioners' brave new world, evidence is eschewed and findings of fact are irrelevant. Petitioners argue that constitutional challenges to bans on commercial speech should turn on broad theories justifying the law's enactment rather than admissible evidence of its actual operation. The law established by this Court holds otherwise.

A. "As-Applied" Challenges Are The Preferred Method Of Testing A Statute's Constitutionality.

None of petitioners' arguments is more novel than the contention that commercial speech restrictions should not be judged on a case-by-case basis. (Pet. Brief at 33-37). This argument, if accepted, would eradicate years of precedent encouraging "as-applied" constitutional challenges.

1. The history of "as-applied" constitutional challenges.

As early as 1885, the Court expressed a preference for as-applied rather than facial constitutional challenges. In

Liverpool, etc. Steamship Co. v. Comrs. of Emigration, 113 U.S. 33 (1885), the Court said:

> In the exercise of [constitutional] jurisdiction, [this court] is bound by two rules, to which it has *rigidly* adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, *never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.*

Id. at 39 (emphasis added); *accord, Trade-Mark Cases*, 100 U.S. 82, 96 (1879). In *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936) (dissenting opinion), Justice Brandeis recognized the as-applied doctrine as one of a family of rules which the Court imposes upon itself to limit its exercise of the power to decide the constitutionality of statutes. Among the seven rules is the rule that the Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* at 346-48 (citations omitted).

As-applied adjudication rests upon the time-tested advisability of having concrete, rather than hypothetical, cases. Justice White recently observed, "as a general proposition, we can arrive at informed judgments only when we have a record showing the actual impact of the challenged statute." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 776 n.4 (1988) (White, J., joined by Stevens and O'Connor, J.J., dissenting). As-applied adjudication also enables the judiciary to avoid confrontations with Congress by deciding no more than necessary to dispose of a specific case. *Id.* This is the preferred

approach "since it enables courts to avoid making unnecessarily broad constitutional judgments." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 447 (1985).

Petitioners' contention that sections 1304 and 1307 should be upheld if they advance Congress's interests at a national level without regard to how they affect an individual plaintiff offends the well-established principle that a generally valid statute may be unconstitutional as it applies to particular litigants. For example, in *Cantwell v. Conn.*, 310 U.S. 296 (1940), the Court did not invalidate the state statute defining a "breach of the peace" on its face but only to the extent that it was construed and applied to prevent the peaceful distribution of religious literature on the streets. Similarly, in *NAACP v. Button*, 371 U.S. 415 (1963), the Court invalidated the state's rules against solicitation by attorneys only as those rules were sought to be applied to the activities of the NAACP involved in that specific case. *See also United States v. Grace*, 461 U.S. 171 (1983); *Boddie v. Conn.*, 401 U.S. 371 (1971); *Marsh v. Alabama*, 326 U.S. 501 (1946). These cases stand for the proposition that even though statutes are in most cases constitutional and effective in promoting legitimate governmental aims, the Court does not ignore or condone applications which are proved to be unconstitutional.

2. "As-applied" challenges to restrictions on speech.

This Court has expressly and repeatedly recognized the validity of "as-applied" challenges to restrictions on

speech. As Justice Stevens observed in *Members of City Council v. Taxpayers For Vincent*:

> The fact that the ordinance is capable of valid applications does not necessarily mean that it is valid as applied to these litigants. We may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity.

466 U.S. 789, 803 n.22 (1984) (citations omitted). Five years later, the Court reiterated that a facially valid restriction on commercial speech might nonetheless violate the first amendment when applied to the plaintiff. In *Board of Trustees v. Fox*, 492 U.S. 469 (1989), Justice Scalia explained the differences between an as-applied and an overbreadth challenge:

> In addition to being clear about the difference between commercial and non-commercial speech, it is also important to be clear about the difference between an as-applied and an overbreadth challenge. Quite obviously, the rule employed in an as-applied analysis that a statute regulating commercial speech must be 'narrowly tailored,' which we discussed in the previous portion of this opinion, prevents a statute from being overbroad. The overbreadth doctrine differs from that rule principally in this: the person invoking the commercial speech narrow-tailoring rule asserts that *the acts of his that are the subject of the litigation* fall outside what a properly drawn prohibition could cover. As we put it in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. at 462, . . . he 'attacks the validity of [the statute] not facially, but as applied to his acts of solicitation,' 436 U.S. at 462, . . . whereas the person

> invoking overbreadth 'may challenge the statute that infringes protected speech even if the statute constitutionally might be applied to him.' *Id.* at 462 n.20.

Board of Trustees at 482-83. Justice Scalia thus confirmed the propriety of a challenge "as applied to [the challenger's] acts of solicitation" or any other commercial speech. *Id.*

In giving *Board of Trustees'* respondents the conditional right to maintain their overbreadth challenge, the Court carefully noted the preferred place of as-applied analysis in adjudicating commercial speech cases. Justice Scalia cautioned:

> It is not the usual judicial practice, however, nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily – that is, before it is determined that the statute would be valid as applied. Such a course would convert use of the overbreadth doctrine from a necessary means of vindicating the plaintiff's own right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws. Moreover, the overbreadth question is ordinarily more difficult to resolve than the as-applied, since it requires determination whether the statute's overreach is *substantial*, not only as an absolute matter, but 'judged in relation to the statute's plainly legitimate sweep,' *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973), and therefore requires consideration of many more applications than those immediately before the court. Thus, for reasons relating both to the proper functioning of courts and to their efficiency, the

> lawfulness of the particular application of the law should ordinarily be decided first.

Id. at 484-85; *see also Peel v. Attorney Registration and Discipline Commission*, 496 U.S. 91, 107 n.15 (1990).

B. The Direct Advancement Test Requires Empirical Proof Rather Than Logical Postulations.

That a governmental body may have a legitimate interest in restricting speech does not automatically render the restriction constitutional. "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). The Court must review evidence of the statute's actual operation in order to determine its constitutionality. *Members of City Council v. Taxpayers For Vincent*, 466 U.S. 789, 803 n.22 (1984).

Petitioners argue that *Central Hudson*'s direct advancement test does not require empirical proof. Petitioners urge that a "common sense" link between the restraint imposed and the policies sought to be advanced is sufficient to pass constitutional muster. (Pet. Brief at 40). The commercial speech cases decided both before and after *Central Hudson* squarely refute this contention.

The four-part *Central Hudson* test is the synthesis of a number of prior commercial speech decisions, including *Linmark Assoc. v. Township of Willingboro*, 431 U.S. 85 (1977). *Linmark* held that an ordinance banning "For Sale" signs violated the First Amendment because the City did not prove that the law was needed to assure integration

in housing. The evidence did not support the City's fears that white residents were "panic selling" or its contention that removing signs would decrease public awareness of home sales and end "white flight." Even though it was not irrational to conclude that "For Sale" signs would increase panic selling, the evidence introduced at trial did not prove the claim. *Id.* at 95. The Court distinguished a decision upholding a ban on "For Sale" signs on the ground that the evidence in that case proved a causal link. *Id.* at 95 n.9.

With *Linmark* as background, the *Central Hudson* majority wrote that a restriction on commercial speech does not directly advance a governmental interest "if it provides only ineffective or remote support for the government's purpose." 447 U.S. at 564. It is only logical to conclude that empirical evidence is necessary to make this determination. The correctness of such an interpretation was confirmed by the Court's subsequent decision in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). The Court rejected the government's postulation that a ban on the mailing of contraceptive advertising advanced the goal of aiding parents' supervision of their children's birth control education. The record showed that parents largely controlled the receipt of household mail and that children were exposed to significant external information about birth control. Because the statute offered "only the most limited incremental support for the interest asserted," it violated the First Amendment. *Id.* at 73.[10]

[10] Even petitioners concede that the *Bolger* court reviewed the record for evidence of the statute's effectiveness. (Pet. Brief at 40 n.19).

If there were still any legitimate question about whether empirical evidence is necessary to satisfy the direct advancement test, it was laid to rest by the Court's decision in *Board of Trustees v. Fox*, 492 U.S. 469 (1989). The Court considered application of a university ban forbidding a company from holding Tupperware parties in dorm rooms. The Court of Appeals had reversed and remanded the district court's judgment, concluding that it was unclear if the ban directly advanced the state's interest and whether, if it did, it was the least restrictive means to achieving the state's end. The Court of Appeals directed the district court to make "appropriate findings on these points." *Id.* at 473. The Supreme Court clarified the fourth prong of the *Central Hudson* test[11] and remanded the case for a proper as-applied analysis.

In remanding for an as-applied determination as to the validity of the laws' application to both commercial and noncommercial speech, the Court said:

> We remand this case for determination, pursuant to the standards described above, of the validity of this law's application to the commercial *and* noncommercial speech that is the subject of the complaint; and, if its application to speech *in either such category* is found to be valid, for determination whether its substantial overbreadth nonetheless makes it unenforceable.

[11] The Court held that governmental restrictions on speech need not be the absolute least restrictive means to achieve the end. *Board of Trustees v. Fox*, 492 U.S. at 477.

Id. at 486 (emphasis added). It is clear that the remand applied to both the third and fourth *Central Hudson* prongs.

Thus, the Court specifically directed lower courts to undertake the type of analysis the District Court performed in this case. In speaking of the latter two prongs of the *Central Hudson* test, the Court said: "[W]e must determine whether the regulation directly advances the governmental interests asserted, and whether it is not more extensive than necessary to serve that interest." *Id.* at 475. It is clear that the remand directed that factual findings were to be made. The Court said:

> The Court of Appeals did not decide, however, whether [the law] directly advances these interests, and whether the regulation it imposes is more extensive than is necessary for that purpose. As noted earlier, it remanded to the District Court for those determinations. We think the remand was correct since further *factual findings* had to be made.

Id. at 475-76 (emphasis added).

If all that was required was a rational evaluation of the alleged justification for the ban, the Court would not have directed the district court to make factual determinations, on an as-applied basis, concerning both the third and fourth prongs of the *Central Hudson* test. The Court specifically identified the governmental interests allegedly involved, the specific regulations, and directed that the factual determinations be made in that specific factual context. In the instant case, the courts below followed this Court's directive precisely.

C. The Record Is Devoid Of Evidence Establishing That Sections 1304 And 1307, As Applied To Respondent, Directly Advance Any Governmental Interest.

In ruling that Sections 1304 and 1307 could not be applied to prohibit WMYK from advertising the Virginia lottery, the District Court reviewed the evidence and found that the laws did nothing to advance either Congress's or North Carolina's interests. It based this conclusion on the proven fact that the North Carolinians in WMYK's broadcast area are saturated with lottery information and advertising from Virginia media. *Edge Broadcasting Co. v. United States*, 732 F. Supp. 633, 639-641 (E.D. Va. 1990).

Petitioners argue that the courts below failed to recognize that sections 1304 and 1307 are designed to serve not one interest, but two. Those interests are discouraging lottery participation in states that do not sponsor lotteries *and* accommodating lottery participation and promotion in states that do. (Pet. Brief at 31-33). Petitioners argue that the courts below ignored the latter legislative goal.

The District Court considered this same argument and rightly concluded that the goals of the federal laws are at most only implicated with respect to the 8% of WMYK's listeners who live in the nine North Carolina counties reached by its signal. *Edge*, 732 F. Supp. at 640. Silencing WMYK could in no way further Virginia's desire to promote its lottery. The sole question thus was whether forbidding WMYK from advertising the Virginia lottery prevented residents of North Carolina from being

exposed to Virginia lottery advertising. It did not. The District Court found:

> Application of Section 1304 to Edge can only speculatively advance the goals of North Carolina. Moreover, to the extent that that provision does reduce lottery participation by North Carolina residents, that reduction is necessarily so slight as to be the kind of 'remote' support rejected in *Central Hudson* as not 'directly advanc[ing]' either interests of federalism or limitations on lottery sales.

Id. Petitioners were entitled to offer evidence of the statutes' effectiveness, but were unable to do so.

Petitioners also argue that *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981) allows Congress to favor one source of commercial speech over another without running afoul of *Central Hudson*'s direct advancement test. (Pet. Brief at 32-33). This case simply stands for the proposition that it is permissible to distinguish between offsite billboard advertising and onsite billboard advertising when evaluating a *facial* challenge to an ordinance. The holding has no application here. First, the difference between offsite and onsite billboard advertising is obvious. Onsite advertising is site specific. Offsite advertising is virtually unlimited. It is axiomatic that limiting billboard advertising to specific sites would be effective in promoting governmental interests. Furthermore, *Metromedia* involved a facial rather than an as-applied challenge. The empirical evidence submitted in this case was not present in *Metromedia*.

D. Congress May Not Constitutionally Silence One Speaker Among Many.

Petitioners' final attempt to gut *Central Hudson* of any meaning masquerades as an argument about logical inconsistency. Petitioners begin with the premise that Congress could lawfully ban any commercial speech regarding lotteries. Petitioners then reason that if a total ban is constitutional, any partial ban must also be upheld. (Pet. Brief at 37).

Assuming, *arguendo*, that Congress could ban all speech about a lawful activity, it does not follow that Congress may deprive selected persons of their right to free speech without accomplishing anything. If the law does not directly advance a legitimate governmental interest, it is nothing more than a naked abuse of power. This is the very point of *Central Hudson*'s direct advancement test. The Constitution does not allow the government to decide arbitrarily who may and may not utter the same words to the same audience.

In *Virginia Board of Pharmacy*, 425 U.S. 748 (1976), the Court recognized that commercial businesses have a First Amendment right to speak. *Id.* at 756. This is a personal right which attaches irrespective of whether the same information is available from other sources.

> We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out and asking him what it is. Nor have we recognized any such limitation on the independent right of the listener to receive the information sought to be communicated.

Id. at 757 n.15. The First Amendment forbids quantifying and suppressing speech based on the notion that "enough is enough."

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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